Ferragon Corporation, Ferrous Metal Processing, Inc., Ferrous Metal Transfer, Inc., a Single Integrated Enterprise *and* Truck Drivers Union Local 407, International Brotherhood of Teamsters, AFL–CIO.[1] Case 8–CA–25034

August 16, 1995

DECISION AND ORDER

BY MEMBERS STEPHENS, COHEN, AND TRUESDALE

On November 23, 1994, Administrative Law Judge Donald R. Holley issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions and an answering brief. Thereafter, the Respondent filed a reply brief to the General Counsel's answering brief and an answering brief to the General Counsel's cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified[3] and set forth in full below.

1. The Respondent filed a motion to reopen the record to introduce a service order dated August 13, 1992, from a wrecker service for the retrieval of steel coils that had fallen off one of the Respondent's trailers.[4] The Respondent contends that the bill proves that steel coils had, in fact, fallen off its trucks in the past and therefore substantiates the Respondent's assertion that safety concerns was one of the motivating factors in its decision to close its trucking operation. The Respondent also contends that the service order shows that the judge erred by finding, in effect, that coils had never fallen off the Respondent's trailers and that the Respondent's safety concerns were pretextual. The Respondent contends that if the judge had credited Eduardo Gonzalez' testimony that coils had fallen off trailers in the past, he would have found that the Respondent's safety concerns were real and provided a lawful reason for the Respondent's subcontracting of its delivery work. Finally, the Respondent contends that its failure to introduce the service order at the hearing should be excused by surprise because the Respondent did not think that the judge would discredit Gonzalez' testimony. For the following reasons, we deny the Respondent's motion to reopen the record.

Section 102.48(d)(1) of the Board's Rules and Regulations states, inter alia, that:

> A motion to reopen the record shall state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes should have been taken at the hearing will be taken at any further hearing.

The Respondent here has not shown that the service order was either ''newly discovered'' or ''previously unavailable.'' Indeed, the Respondent had the document in its possession for over a year prior to the hearing in this case and chose not to introduce it into evidence. Further, we do not find that the service order, if it were introduced into evidence, would require a different result from that reached by the judge. In this regard, we note that the judge did not find that coils had not fallen off trailers in the past. Rather, noting that Gonzalez was concerned that coils ''might fall off of trailers and expose Respondent to liability,'' the judge observed that Union Representative Davis had suggested to the Respondent that it could purchase chains with enough strength to prevent the coils from falling off the trailers. The judge also observed that the Respondent had purchased insurance on the trucks performing the delivery work. On these bases, the judge found that the Respondent did not have ''the safety concerns it professed to have.'' Thus, in finding that the Respondent's safety concerns were pretextual, the judge did not find that coils had never fallen off the

[1] The General Counsel has excepted to the judge's failure to modify the case caption to delete reference to Case 8–CA–25238 which was severed from the instant proceeding prior to hearing. We find merit in this exception and amend the case caption accordingly.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge incorrectly spelled the name of the Respondent's president, Eduardo Gonzalez, throughout his decision. This error will be corrected before printing in the bound volume.

[3] The General Counsel excepts, inter alia, to the judge's inadvertent failure to include in his conclusions of law and recommended Order his findings, to which the Respondent did not except, that the Respondent violated Sec. 8(a)(1) on two occasions through Ferrous Metal Transfer Manager David Koenig's seeking to cause employees to urge or convince their fellow employees to vote ''no'' at the election. We find merit in this exception and amend the judge's conclusions of law accordingly. We shall also modify the recommended Order to include this violation. Although the judge included in his conclusions of law his findings that the Respondent violated Sec. 8(a)(3) by subcontracting unit work and laying off employees and Sec. 8(a)(5) by failing to notify and bargain with the Union over its decision to sublease its trucks, he inadvertently failed to include these findings in his recommended Order. We shall further modify the judge's recommended Order to include these violations.

[4] The General Counsel filed an opposition to the Respondent's motion to reopen the record.

trailers, but emphasized that the problem could be corrected and that the Respondent's exposure to liability was limited by its purchase of insurance from Ryder.[5] In these circumstances, the submission of a service order indicating that coils had actually fallen off trailers in the past would not affect the judge's analysis or the result. For all these reasons, we deny the Respondent's motion to reopen the record.

2. The judge found, inter alia, that the Respondent violated Section 8(a)(1) by soliciting employee grievances and promising to remedy them. The Respondent excepts on the ground that the changes it made did no more than bring the Respondent's operations into compliance with certain regulations and that it is not a violation of the Act to remedy noncompliance with the law. We find this exception without merit.

After Gonzalez, the Respondent's president, received the Union's May 27, 1992 letter requesting recognition,[6] he held two meetings with the drivers whom the Union sought to represent. At the first meeting, held on June 2, Gonzalez told the employees that he had just received a letter from the Teamsters to the effect that they were organizing the Respondent's employees. Gonzalez said that he thought this might be a hoax and asked the drivers if they knew anything about it. The judge found, and we agree, that Gonzalez' questioning of the drivers constituted an unlawful interrogation in violation of Section 8(a)(1) of the Act.[7]

At the second meeting, held some 2 weeks later, Gonzalez asked why the drivers had gone to the Union instead of coming to him with their problems. Carl Dargocey complained that drivers had to work extra long hours and were required to pull heavy loads. Gonzalez responded that he had already issued a letter about heavy loads and that hauling heavy loads would cease immediately. According to the credited testimony of employee Tommie Smith, Gonzalez told Koenig, the manager of the Ferrous Metal Transfer operation, that the drivers would no longer haul heavy loads and that drivers ''won't be working all those hours.''

Although the judge found merit in the Respondent's contention that no violation should be found to the extent that it applied to the Respondent's promise to stop overloading trailers, he also found that the Respondent's lawful compliance theory failed to offer a justification ''for Gonzalez' promise to eliminate waiting time at the mill which caused the drivers to work long hours.'' On this basis, the judge found that the Respondent violated Section 8(a)(1) by soliciting employee grievances and promising to remedy them.

The Respondent excepts on the ground that Smith's testimony to the effect that the Respondent promised that the employees would not be working all those hours signified only that the Respondent was going to reduce the number of working hours to comply with the law. Accordingly, the Respondent contends that the judge erred by equating the promise to reduce the number of hours with reduction of waiting time at the mill. We find this argument without merit. In this regard, according to Smith's uncontroverted testimony, after the drivers made these complaints, the loads were cut back ''[a]nd as far as a lot of guys standing in the mill so many hours, that was cut down. They started sending other drivers in there.'' Thus, it is clear that when the employees complained of working ''extra hours'' or ''a lot of hours,'' they were not complaining about *driving* more hours than they were legally permitted to drive, but were complaining about the time that they spent at the mill waiting for loads. It is also clear that the Respondent understood that these complaints concerned waiting time at the mill, not actual driving time, because the Respondent in fact acted on these complaints by reducing waiting time at the mill. Further, the Respondent introduced no evidence that it reduced the drivers' driving time or, indeed, evidence that the drivers actually drove more hours than legally permissible. In these circumstances, we agree with the judge that the Respondent's promise to reduce hours was a response to the drivers' expression of dissatisfaction with excessive standing time at the mill, not an effort to bring the Respondent into compliance with the law. Accordingly, we adopt his finding of this violation.

3. The Respondent excepts to the judge's finding that it violated Section 8(a)(3) by subcontracting out its Ferrous Metal Transfer (FMT) delivery work and by laying off unit employees on the ground that the General Counsel failed to establish a prima facie case that the Respondent's conduct was unlawful. The Respondent also contends that, even assuming that the General Counsel established such a prima facie case, the judge erred in finding that the Respondent's avowed reasons for closing its delivery operation did not satisfy its burden on rebuttal. We disagree.

[5] The Respondent contends that the judge erred in finding that its purchase of insurance from Ryder in effect insulated it from liability for damages resulting from coils falling off the trailers. Contrary to the Respondent's assertion, we find that the judge set out two separate reasons why he was unconvinced that the Respondent's safety concerns were valid, the first that the coils' problem could be corrected, and the second that the Respondent's liability for damage occurring in the course of its trucking operation was limited by its insurance agreement with Ryder. Accordingly, we find this exception without merit.

[6] All dates are in 1992 unless otherwise stated.

[7] The General Counsel excepts to the judge's inadvertent failure to include in his recommended Order a provision corresponding to this violation. We shall modify the judge's recommended Order to include such a provision.

Member Stephens, considering the totality of the circumstances, would not find that Gonzalez' question violated Sec. 8(a)(1) of the Act.

In ''dual motive'' cases the Board applies a *Wright Line* analysis.[8] Under this analysis the General Counsel must carry the initial burden of showing ''that the protected conduct was a 'motivating factor' in the employer's decision.''[9] Once the General Counsel has satisfied this burden, the burden shifts to the employer ''to demonstrate that the same action would have taken place even in the absence of the protected conduct.''[10] Applying this analysis here, the judge found that the General Counsel met its initial burden of establishing that the Respondent's closure of its delivery operation and its layoff of unit employees was unlawfully motivated and that the Respondent failed to rebut this prima facie case. Accordingly, the judge found that the Respondent violated Section 8(a)(3) by subcontracting the FMT delivery work to Steel Transport and by laying off eight unit employees.[11] For the following reasons, we agree with the judge's finding of these violations.

As explained in *W. R. Case & Sons Cutlery Co*., 307 NLRB 1457, 1463 (1992), ''a prima facie case [of discriminatory motivation] is made out by proof of employee union activity, along with employer knowledge of, and employer animus toward, it.'' The judge found, and we agree, that these elements are present here. In this regard, the judge found that the Respondent was well aware of the union activities of certain employees by Koenig's statement to unit employee Jackie Rucker that drivers Dargocey, Rafael Ramos, and Mark Bristor were the three drivers who ''probably started this stuff and we're going to get rid of them the best way that we know how.'' During this same conversation, Koenig identified drivers Donald McClain, Branko Devic, and John Brooks as employees who would vote ''no'' in the election. Thus, the record supports the judge's finding that the Respondent knew of its employees' union activities and, indeed, knew which employees were the most ardent union supporters and which employees opposed the Union. That the record also supports a finding that the Respondent harbored ''marked anti-union animus,'' as the judge found, is clearly evidenced from the judge's findings, with which we agree, that the Respondent committed numerous 8(a)(1) violations including several threats to terminate its delivery operation and lay off the unit employees if the employees selected the Union as their bargaining representative. Finally, as the judge observed, little more than a month after the Union was certified as the bargaining representative of the unit employees, the Respondent carried through on its threats by subcontracting the FMT delivery work to Steel Transport and by laying off 11 unit employees. The only unit employees who continued to work for FMT were McClain and Devic, two of the three employees whom the Respondent considered antiunion.[12] In these circumstances, we agree with the judge that the General Counsel established a prima facie case that the Respondent's subcontracting of its delivery work and its layoff of the unit employees were unlawfully

[8] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] Id. at 1089.

[10] Id.

[11] The General Counsel excepts to the judge's failure to find that the Respondent also violated Sec. 8(a)(3) by unlawfully discharging employees Larry Hill, John Casto, and Eli Pounds. We find merit in this exception. The judge apparently concluded that because Hill, Casto, and Pounds were hired on August 24, a month after the election, that they had not participated in union activity and were, therefore, not discriminatees entitled to reinstatement and backpay. We disagree. It is well settled that when an employer unlawfully closes its operation and discharges or lays off unit employees, the Board requires the employer to reinstate and make whole all employees affected by the employer's unlawful course of conduct. See *Coronet Foods*, 305 NLRB 79, 92 (1991), enfd. 981 F.2d 1284 (D.C. Cir. 1993); *Masland Industries*, 311 NLRB 184, 202 (1993). Since Hill, Casto, and Pounds were included in the bargaining unit at the time the Respondent closed its trucking operation in furtherance of its unlawful plan to get rid of the Union and because the Respondent laid them off as part of that unlawful plan, we find that the Respondent violated Sec. 8(a)(3) by unlawfully discharging Hill, Casto, and Pounds. We amend the judge's conclusions of law and remedy to conform to our finding. In addition, we shall modify the judge's recommended Order to include this violation and to provide that the Respondent reinstate and make these employees whole.

[12] The Respondent excepts to the judge's finding that the Respondent continued to employ Brooks, the third employee whom the judge found to be anitunion, after it laid off the 11 unit employees whom we have found were unlawfully terminated. In support, the Respondent observes that the judge himself stated that the record failed to indicate when Brooks was laid off and that an exhibit listing the Respondent's unit employees as of November 30 includes only McClain and Devic. We find merit in this exception to the extent that we agree with the Respondent that the record does not support a finding that Brooks continued to work for the Respondent after November 30. We find, however, without merit the Respondent's further argument to the effect that the fact that Brooks, an antiunion employee, was laid off before some of the employees whom the Respondent knew were prounion establishes that the Respondent's layoff of the unit employees was not motivated by antiunion animus. We decline to draw that inference here where the Respondent has introduced no evidence to indicate when Brooks left the Respondent's employ or why he did so. Arguably, Brooks might have voluntarily quit and therefore the date of his departure would be irrelevant to the issue of whether the Respondent's order of layoff evidenced antiunion animus. As Brooks' employer, the Respondent was in the best position to introduce evidence as to when Brooks left and why. In the absence of such evidence, we decline the Respondent's invitation to view Brooks' departure as support for the Respondent's contention that the layoffs were legitimate. In this regard, we also reject the Respondent's argument that the layoffs occurring in order of seniority is evidence that the layoffs were not unlawfully motivated. While the fact that the Respondent's most senior employees were also the most antiunion may have made it easier for the Respondent to achieve its unlawful purpose, the fact remains that immediately after the Union was certified as the bargaining representative of the unit employees, the Respondent subcontracted out its delivery work and laid off all but those few employees whom it knew to be antiunion. The fact that these employees also happened to have the most seniority does not establish that the Respondent's conduct was not discriminatorily motivated.

motivated and therefore violated Section 8(a)(3) of the Act.[13]

We also agree with the judge that the Respondent's asserted reasons for closing FMT and laying off the unit employees are ''unconvincing'' and fail to rebut the General Counsel's prima facie case. In this regard, we agree with the judge, for the reasons stated by him, that the Respondent's avowed reasons for terminating its FMT operation, (1) that there was lack of management time for FMT; (2) that the Respondent had safety concerns about the delivery operation; and (3) that there was a financial crisis that threatened the existence of Ferrous Metal Processing (FMT), are without merit. We also observe, however, that the Respondent asserted a fourth reason, that FMT ''didn't have operating management that knew what they were doing,'' in support of its contention that its decision to close FMT was lawful. Because the Respondent set out this reason with less clarity than the three reasons set out above, the judge inadvertently failed to address it. The Respondent excepts to the judge's failure in this regard.

While we find merit in this exception to the extent that we agree that the judge inadvertently failed to address this fourth reason, we find that that failure does not require a different result from that reached by the judge. In this regard, the Respondent contends that Koenig, FMT's manager who was responsible for its day-to-day operation, did a poor job in managing the FMT operation and that, in effect, because of this failure overall management of FMT became increasingly burdensome for the Respondent and was a motivating factor in the Respondent's decision to close the FMT operation. For the following reasons, we find that this fourth reason also lacks merit.

The record establishes that the Respondent selected Koenig to manage FMT when the Respondent first began that delivery operation in 1989 and that Koenig managed that operation from its inception to its closure. Despite the Respondent's contention of poor management, the fact remains that Koeing did manage FMT for 3 years without being demoted or losing his job. Further, the fact that the Respondent closed the operation shortly after the Union won the election suggests, as discussed above, that by closing its FMT operation the Respondent was carrying out its threat, as expressed on numerous occasions by Koenig himself, to close if the Union came in. For all these reasons, we agree with the judge that the Respondent's closure of its FMT operation and its layoff of the unit employees was implemented for unlawful discriminatory reasons and therefore violated Section 8(a)(3) and (1) of the Act.

Finally, since we agree with the judge that the Respondent's conduct in subcontracting the FMT delivery work and laying off the unit employees was unlawful, we adopt his further finding that the Respondent was not exempt from its obligation to bargain with the Union over its decision to subcontract the work under *First National Maintenance Corp*.[14] As the Board stated in *Central Transport*, 306 NLRB 166, 167 (1992), enfd. in part 997 F.2d 1180 (7th Cir. 1993), ''[d]iscrimination on the basis of antiunion animus cannot serve as a lawful entrepreneurial decision.'' Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(5) by failing and refusing to bargain with the Union over its decision to sublease its trucks to Steel Transport.[15]

4. As part of his recommended remedy, the judge recommended that the Respondent be required to reestablish and restore its FMT operation as it existed prior to the layoff of unit employees. In making this recommendation, the judge found that the restoration of the status quo ante would not be unduly burdensome. The Respondent excepts on the ground that the judge erred in finding that it would not be unduly burdensome for it to reestablish its FMT operation. The Respondent also requests that the Board modify the judge's recommended Order ''to provide explicitly that restoration and reinstatement will not be required if Respondent can establish at the compliance stage of the proceeding that those remedies are inappropriate.'' We agree with the judge that the Respondent has failed to show that restoration of the FMT operation would be unduly burdensome and we, therefore, adopt his recommended remedy in this regard.[16] We agree, how-

[13] Member Stephens agrees that the General Counsel has presented evidence from which we may reasonably infer that animus against the Union was a motivating factor in the Respondent's decision, announced not long after the Union's certification, to subcontract the work of its newly unionized delivery employees and lay them off. He also agrees, for the reasons stated by the judge and in the discussion infra, that the Respondent failed to show that it would have taken those actions even in the absence of the employees' selection of union representation.

[14] 452 U.S. 666 (1981).

[15] Member Cohen does not pass on the contention that a discriminatorily motivated decision under Sec. 8(a)(3) is necessarily a mandatory subject of bargaining under Sec. 8(a)(5). In light of the 8(a)(3) violation and the remedy therefor, the finding of an 8(a)(5) violation would not add substantively to the remedy.

[16] The Respondent contends that it would be unduly burdensome to reestablish its FMT operation because it has no expertise in managing such an operation and its reestablishment would threaten the financial stability of the Respondent itself. We found these reasons pretextual when the Respondent offered them as reasons for its closure of the FMT operation and we reject them now for the same reasons. The Respondent also contends that it would be unduly burdensome to restore the FMT operation because it would have to hire a new manager and support staff, renew longterm leases, and redeposit $30,000 with Ryder. We reject these reasons because the Respondent has introduced no evidence to support its contention. On the contrary, the Respondent took these steps when it started up its FMT operation and, but for its unlawful conduct, would not be required to repeat them now. Finally, the Respondent contends that it would be unduly burdensome because the Respondent would lose in-

ever, with the Respondent that it should have the opportunity at the compliance stage of this proceeding to present previously unavailable evidence, if any, to demonstrate that the reinstitution of the FMT operation would be unduly burdensome.[17] We shall modify the judge's recommended Order accordingly.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Ferragon Corporation, Ferrous Metal Processing, Inc., and Ferrous Metal Transfer, Inc., a Single Integrated Enterprise, Brooklyn, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Soliciting the assistance of employees to discourage or stop the Union's organizing drive by asking employees to convince other employees to vote against the Union.

(b) Interrogating employees concerning their knowledge of the Union's organizing campaign or of other employees' union activities.

(c) Unlawfully threatening employees regarding their participation in union activities.

(d) Soliciting employees' grievances and promising to remedy them during a union organization campaign.

(e) Threatening to take away employee benefits and start bargaining from ''rock bottom'' if they vote for the Union.

(f) Threatening that drivers will lose their jobs if they vote for a union.

(g) Threatening plant closure if employees obtain union representation.

(h) Telling employees that their jobs will be in jeopardy if they vote for the Union.

(i) Telling employees the Company intended to get rid of named employees because they started the union ''stuff.''

(j) Telling employees they would be laid off and their trucks would be turned in if they voted for the Union.

(k) Seeking to create the impression that the union activities of its employees are under surveillance.

(l) Interrogating an employee regarding the crossing of a picket line and threatening discharge if he failed to cross a picket line.

(m) Telling an employee drivers were not invited to attend a company picnic because they are union troublemakers.

(n) Subcontracting unit work and laying off employees because they chose the Union to represent them.

(o) Refusing to bargain with the Union over its decision to sublease its trucks to another company.

(p) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Unless it is shown that it is unduly burdensome to reinstitute the transportation activities at its FMT facility, reestablish and resume those operations in a manner consistent with the level and manner of operations which existed before the operation was downsized commencing September 18, 1992, and offer employees Tommie Smith, Louis Davis, Alonzo Henderson, Mark Bristor, Rafael Ramos, Karl Hoffman, Carl Dargocey, Jackie Rucker, Eli Pounds, John Casto, and Larry Hill immediate and full reinstatement to their former positions of employment.

(b) Make whole employees Tommie Smith, Louis Davis, Alonzo Henderson, Mark Bristor, Rafael Ramos, Karl Hoffman, Carl Dargocey, Jackie Rucker, Eli Pounds, John Casto, and Larry Hill for any losses they incurred as a result of the discrimination against them, in the manner specified in the remedy section of the judge's decision.

(c) Remove from its files any reference to the unlawful layoffs of the above-named employees and notify them in writing that this has been done and that their terminations will not be used against them in any way.

(d) On request, recognize and bargain with the Union as the exclusive collective-bargaining agent of its employees in the bargaining unit and sign any agreement reached on terms and conditions of employment of employees in the unit.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its Brooklyn, Ohio facility copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Re-

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come from rent currently paid by the subcontractor and income from referrals. The Respondent, however, has introduced no evidence as to the amounts of such income that it would lose if the FMT operation were restored and whether those amounts would be significant. Accordingly, we agree with the judge that the Respondent has not shown that the reestablishment of its FMT operation would be unduly burdensome.

[17] *Lear Siegler, Inc.*, 295 NLRB 857, 860–862 (1989); *Compu-Net Communications*, 315 NLRB 216, 216 fn. 3 (1994); *We Can, Inc.*, 315 NLRB 170, 174–177 (1994).

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

spondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT solicit the assistance of employees to discourage or stop the Union's organizing drive by asking employees to convince other employees to vote against the Union.

WE WILL NOT interrogate employees concerning their knowledge of the Union's organizing campaign or of other employees' union activities.

WE WILL NOT unlawfully threaten employees regarding their participation in union activities.

WE WILL NOT solicit employees' grievances and promise to remedy them during a union organization campaign.

WE WILL NOT threaten to take away employee benefits and start bargaining from ''rock bottom'' if they vote for the Union.

WE WILL NOT threaten that drivers will lose their jobs if they vote for a union.

WE WILL NOT threaten plant closure if employees obtain union representation.

WE WILL NOT tell employees that their jobs will be in jeopardy if they vote for the Union.

WE WILL NOT tell employees the Company intended to get rid of named employees because they started the union ''stuff.''

WE WILL NOT tell employees they would be laid off and their trucks would be turned in if they voted for the Union.

WE WILL NOT seek to create the impression that the union activities of our employees are under surveillance.

WE WILL NOT interrogate an employee regarding the crossing of a picket line and threaten discharge if he failed to cross a picket line.

WE WILL NOT tell an employee drivers were not invited to attend a company picnic because they are union troublemakers.

WE WILL NOT subcontract unit work and lay off employees because they chose the Union to represent them.

WE WILL NOT refuse to bargain with the Union over our decision to sublease our trucks to another company.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

Unless it is shown that it is unduly burdensome to reinstitute the transportation activities at our FMT facility, WE WILL reestablish and resume those operations in a manner consistent with the level and manner of operations which existed before the operation was down-sized commencing September 18, 1992, and WE WILL offer employees Tommie Smith, Louis Davis, Alonzo Henderson, Mark Bristor, Rafael Ramos, Karl Hoffman, Carl Dargocey, Jackie Rucker, Eli Pounds, John Casto, and Larry Hill immediate and full reinstatement to their former positions of employment.

WE WILL make whole employees Tommie Smith, Louis Davis, Alonzo Henderson, Mark Bristor, Rafael Ramos, Karl Hoffman, Carl Dargocey, Jackie Rucker, Eli Pounds, John Casto, and Larry Hill for any losses they incurred as a result of the discrimination against them.

WE WILL remove from our files any reference to the unlawful layoffs of the above-named employees and WE WILL notify them in writing that this has been done and that their terminations will not be used against them in any way.

WE WILL, on request, recognize and bargain with the Union as the exclusive collective-bargaining agent of our employees in the bargaining unit and sign any agreement reached on terms and conditions of employment of employees in the unit.

> FERRAGON CORPORATION, FERROUS METAL PROCESSING, INC., FERROUS METAL TRANSFER, INC., A SINGLE INTEGRATED ENTERPRISE

Thomas M. Randazzo, Esq., for the General Counsel.
Alan G. Ross, Esq. and *Debra G. Simms, Esq. (Ross, Brittain & Schonberg Co., L.P.A.)*, of Cleveland, Ohio, for the Respondent.
Sorrell Logothetis, Esq. (Logothetis & Pence), of Dayton, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

DONALD R. HOLLEY, Administrative Law Judge. On an original charge filed by the above-named Union in Case 8–CA–25034 on November 24, 1992 (amended first on January 21, 1993, and second on March 8, 1993), the Regional Director for Region 8 of the National Labor Relations Board (the Board) issued a complaint on March 24, 1993, which alleged that since June 1992, Ferragon Corporation, Ferrous Metal Processing, Inc., and Ferrous Metal Transfer, Inc., a Single Integrated Enterprise (the Respondent collectively and Ferragon, FMP, and FMT individually) has engaged in conduct which violates Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). On February 24, 1993, Barbara Marlowe, an individual, filed the charge in Case 8–CA–25238, and on April 30, 1993, her case was consolidated with Case 8–CA–25034 for trial. Simultaneously, the Regional Director issued an amended consolidated complaint which realleged the matter set forth in the March 24, 1993 complaint, and additionally alleged that Respondent violated Section 8(a)(1) of the Act when it ''attempted to dissuade another employer from hiring an employee because of her union sympathies and beliefs.'' Respondent filed a timely answer denying that it had engaged in the unlawful conduct set forth in the amended consolidated complaint.

The record in the instant case was opened in Cleveland, Ohio, on June 23, 1993. The case was recessed after the parties reached tentative agreement on the terms for settlement of the case. Pursuant to counsel for the General Counsel's motion, an order severing Case 8–CA–25238 and ordering resumption of the hearing in Case 8–CA–25034 on October 19, 1993, was issued on September 14, 1993. Thereafter, further hearing was held in Cleveland, Ohio, during the period extending from October 19 to 22, 1993.[1]

On the entire record, including careful consideration of posthearing briefs filed by Respondent and the General Counsel, and from my observation of the demeanor of witnesses who appeared to give testimony, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is not disputed. It is admitted that Respondent, an Ohio corporation, is engaged in the processing and transfer of steel products and that it annually, at its Brooklyn, Ohio facility, provides services valued in excess of $50,000 to LTV Steel, WCI Steel, Mid-West Material, Olympic Steel, Standard Steel, and other enterprises within the State of Ohio, which are directly engaged in interstate commerce. It is admitted, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. STATUS OF LABOR ORGANIZATION

It is admitted, and I find, that Truck Drivers Union Local No. 407, International Brotherhood of Teamsters, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Overview*

Ferrous Metal Processing, Inc. (FMP), was incorporated on February 17, 1983. It was created to process hot rolled steel for various customers. Hot rolled steel is used for tire rims, auto frames, pipes, and tanks. FMP does not own the steel it processes. Instead, the steel is picked up at the customer's business location, transported to FMP, processed, and returned to the customer. The processing includes pickling, slitting, shearing, temple rolling, and leveling. Pickling involves placing coils of steel in acid to remove rust. Slitting, shearing, and leveling are processes whereby the steel is cut into specified lengths and widths. Temple rolling involves reducing the thickness of steel sheets to improve the physical properties of the product.

Eduardo (Ed) Gonzalez is the president and sole stockholder of FMP. In 1990, he created Ferragon Corporation which functions as a holding company. Simultaneously, he converted FMP into an operating division of Ferragon, and he subsequently organized other operating divisions of Ferragon such as Spectrolux Co. and Republic Metals Co. Spectrolux specializes in cold rolled steel which is subjected to various tests so defects can be discovered if present, and while it existed, Republic Metals purchased steel, improved the basic product, and sold it to FMP customers.

Prior to 1989, the coil steel coming into the FMP facility and subsequently leaving it in altered form was transported primarily by common carriers chosen by the customer. Gonzalez formed an opinion that FMP's customers might appreciate a situation wherein FMP picked up the steel, processed it, delivered it back to the customer, and submitted one bill for the entire procedure. In an attempt to sell his pickup, process, and deliver (PPD) idea to his customers, he caused Ferrous Metal Transfer, Inc. (FMT) to be incorporated on January 9, 1989. As was the case with FMP, Ferragon, Spectrolux, and Republic, Eduardo Gonzalez is the CEO and sole shareholder of FMT.

FMT entered the trucking business by leasing trucks from Ryder Truck and Leasing Rental Company. The lease agreements were executed between FMT and Ryder, with Ferragon as the guarantor. By July 1992, FMT had 11 trucks and 11 drivers. At that time, those trucks and drivers handled 20 to 30 percent of the steel arriving at FMP's facilities for processing. Gonzalez testified that those customers using Respondent's pickup, process, and delivery services appreciated the fact that FMP arranged for pickup and delivery of their steel and sent them one bill for all services provided.

At the time, FMT was created, Gonzalez transferred one David Koenig, formerly the shipper at FMP, to the position of manager at FMT. The record reveals that drivers were dissatisfied with the fact that they had to wait for product at

[1] During the hearing, the General Counsel amended par. 16 of the complaint by substituting ''August '' for ''June'' and amended par. 24(a) by indicating Louis Davis was laid off on November 13, 1992, rather than September 18, 1992.

the FMP mill, and dissatisfied with Koenig's requirement that they haul loads that were heavier than the legal limit, and they sought Teamsters representation in April 1992. The Union subsequently mailed FMT a letter demanding recognition as the drivers' representative on May 27, 1992, and Teamsters, thereafter, filed a petition for an election in Case 8–RC–14732 on June 1, 1992. An election was held in the following unit on July 17, 1992.

> All truck drivers at the Employer's 11103 Memphis Avenue, Brooklyn, Ohio facility but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.[2]

The Union was certified as the exclusive collective-bargaining representative of employees in the described unit on July 28, 1992. Thereafter, bargaining sessions were held on September 2 and 10, 1992. At the outset of bargaining, Respondent indicated it intended to close FMT's operations absent union input which would cause Gonzalez to change his mind. Notice was, thereafter, given by Respondent that it would close FMT on September 16, 1992.

Summarized, the complaint alleges that Ferragon, FMP, and FMT constitute a single integrated business enterprise and single employer within the meaning of the Act; that Respondent engaged in some 23 individual 8(a)(1) violations; that Respondent laid off 11 named employees during September and November 1992 for discriminatory reasons; and that Respondent violated Section 8(a)(5) of the Act by transferring or subcontracting the work of FMT employees to others without adequate notice to the Teamsters and without affording the Union an opportunity to bargain concerning such action. The issues and facts offered to prove and/or disprove them are discussed individually below.

B. *The Single Employer Issue*

The Board will consider nominally separate business entities to be a single employer when they comprise an integrated enterprise. *Radio Union v. Broadcast Services of Mobile*, 380 U.S. 255, 256 (1965). Some of the principal factors which have been considered relevant in determining the extent of integration are: (1) interrelations of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership or financial control. *Sakrete of Northern California*, 137 NLRB 1220, 1222 (1962). As stated in *Emsing's Supermarket*, 284 NLRB 302 (1987):

> None of these factors, alone, is controlling, nor need all of them be present. Single-employer status ultimately depends on ''all the circumstances of the case'' and is characterized by the absence of the ''arm's length relationship found among unintegrated companies.'' Stated otherwise, the fundamental inquiry is whether there exists overall control of critical matters at the policy level. [Citations omitted.]

The facts in the instant record clearly reveal that Ferragon, FMP, and FMT constitute a single employer within the meaning of the Act.

As revealed, supra, Eduardo Gonzalez is the sole owner of the stock of each of the entities under discussion. The record reveals he personally exerts financial control over the entities as he personally supplied the capital used to create the entities, he determines the wages and benefits which are received by employees of the entities, and he determines the size, but not the composition, of the work force of the entities. Moreover, the record reveals Anthony Potelicki, the chief financial officer of Ferragon/FMP, controls the finances, banking activities, and accounting functions of FMT as well as those of Ferragon/FMP.

With respect to the management criteria, Gonzalez credibly testified his brother, Luis, accomplishes the day-to-day management of FMP while Koenig accomplishes that task at FMT. At the top level, Ed Gonzalez serves as president of Ferragon/FMP, Hopes Miles serves as its vice president, and such individuals occupy the same positions at FMT. While Luis Gonzalez does the hiring at FMP and Koenig does the hiring at FMT, Ed Gonzalez testified that he retains the final say as to employees hired, and he determines the size of the work force. Significantly, FMT's financial statements for the years 1989 through 1992 reveal that Ferragon/FMP charged FMT $40,000, $200,475, 180,000, and $210,000 for management/administrative services during 1989–1992, respectively (G.C. Exh. 24).

The actions of Ferragon/FMP management during the Teamsters organizational campaign clearly reveal that labor relations of Ferragon/FMP and FMT are centrally controlled. Thus, as discussed in greater detail, infra, the record reveals that Ed Gonzalez met with FMT drivers on two occasions shortly after the Union demanded recognition and filed its petition for an election. Similarly, it reveals, as discussed more fully, infra, that Frank Frostino, Ferragon's vice president of operations, and Hope Miles, Ferragon/FMP vice president of sales, accompanied Ed Gonzalez to meetings held with FMT drivers and assisted Gonzalez by urging the drivers to vote against union representation. Finally, the record reveals that Miles and Luis Gonzalez represented FMT at the September 10, 1992 bargaining session.

Turning to the integration of operations criteria, the record reveals the operations of Ferragon/FMP and FMT were integrated to a marked extent during the period under discussion. As indicated, supra, Ed Gonzalez created FMT to enable FMP to better serve its customers by providing for the pickup of steel coils at the customers' premises, the processing of the coils at the FMP mill, and the return of the processed steel to the customer's premises in response to one call by the customer. Ferragon/FMP was FMT's only customer and its business actions dictated FMT's workload. Significantly, Potelicki testified that he makes all financial decisions involving Ferragon/FMP, as well as FMT, and he indicated that he and his staff at Ferragon/FMP perform all accounting, payroll, and banking transactions for the entities under discussion. Included in those financial transactions is the billing of the FMP customers for the processing of steel as well as the transportation of the product to and from the customers' premises. Finally, the record reveals that Ferragon/FMP and FMT use the same address and, while located in separate buildings, occupy the same property which is leased by Ed Gonzalez.

In sum, the record reveals that FMT's trucking operation is functionally and financially dependent on Ferragon/FMP,

[2] Admitted by Respondent's answer to be an appropriate unit for bargaining.

and, to an extent, the reverse is true. Noting, in particular that Ferragon/FMP extracts significant sums of money from FMT for the executive, administrative, and financial services it provides FMT, I find that Ferragon/FMP and FMT constitute a single integrated enterprise and a single employer within the meaning of the Act.

C. *The Alleged Independent 8(a)(1) Violations*

1. Conduct attributed to Eduardo Gonzalez

Two drivers, Carl Dargocey and Tommie Smith, testified that on June 2, 1992, at approximately 5 p.m., they and other drivers were summoned to the office where Ed Gonzalez spoke with them. A composite of their testimony reveals that Gonzalez indicated he had just received a communication which indicated that the Teamsters were organizing the drivers, and he told employees he thought it might be a trick or a hoax and he asked if the drivers knew anything about it. One driver, Branko Devic, responded by stating he did not need a union, but the remaining drivers remained silent. Gonzalez concluded the meeting by stating he would investigate the matter and get back to then.

According to Dargocey, Ed Gonzalez met a second time with the drivers about 2 weeks after the above-described meeting. Also attending for management were FMP officers Frank Frostino and Hope Miles. Dargocey recalled that Ed Gonzalez made a major thing about why the drivers had gone to the Union before coming to him about their problems. During the meeting Dargocey expressed his dissatisfaction with the fact that drivers had to work extra long hours and were required to pull heavy loads. He recalls that Gonzalez responded that he had already issued a letter about heavy loads and hauling heavy loads would cease immediately. Employee Smith, who also described the meeting, recalled that Ed Gonzalez told Koenig in the drivers' presence that ''these guys won't haul no more heavy loads'' and he said they won't be working all those hours. Dargocey testified, without contradiction, that Frank Frostino told the drivers during the meeting that business was expanding and they may be running 48 States and Canada in the future, and he asked if the drivers would be receptive to that.

Eduardo Gonzalez admitted he discussed heavy loads and long working hours with the drivers at some time, but he did not expressly acknowledge meeting with the drivers before he read to them speeches prepared by his attorneys. Miles and Frostino were not called to give testimony during the hearing. I credit employees Dargocey and Smith and find that Gonzalez met with employees twice in June as they claim.

In agreement with the General Counsel, I find that Ed Gonzalez unlawfully interrogated the drivers at the June 2 meeting as his inquiry was designed to, and did, evoke replies which would reveal the union sentiments of the employees attending the meeting. Patently, Gonzalez sought during the second meeting to cause employees to voice their problems and he clearly indicated Respondent would remedy them. While such conduct would normally amount to a violation of Section 8(a)(1) of the Act as alleged, Respondent contends no violation should be found because a business must be free at any time to make changes which bring it into compliance with the law, i.e., stop overloading trailers. Obviously, the contention fails to offer justification for Gonzalez' promise to eliminate waiting time at the mill which caused the drivers to work long hours. In the circumstances described, I find that by soliciting employees' grievances and promising to remedy them, Respondent violated Section 8(a)(1) of the Act as alleged.

2. Conduct attributed to David Koenig[3]

a. *By employee Carl Dargocey*

Dargocey testified that in mid-June 1992, Koenig told him and driver John Brooks that ''we would be losing all of our benefits and everything is negotiable in contracts and that we should vote no for this union.''

Employee Dargocey testified that at 3:40 p.m. on June 18, 1992, Koenig told him he had ''better go out and tell all the drivers that we would not have jobs at Ferrous Metal Transfer if we voted the union in.''

Employees hearing Koenig's mid-June negotiation related remarks could logically conclude Respondent would take away their benefits if they voted for the Union. Accordingly, I find, as alleged, that by making the comment Koenig engaged in conduct which violates Section 8(a)(1) of the Act. Patently, by threatening that drivers would lose their jobs if they voted the Union in, Respondent, though Koenig, violated Section 8(a)(1) of the Act.

b. *By employee Rafael (Nicky) Ramos*

Employee Ramos testified that on July 15, 1992, 2 days before the election, Koenig asked him if he and the other drivers had made up their minds about the union issue; said that they had better make up their minds because they were jeopardizing what they had right now—$400 guarantee and 22 percent they were giving them; and said if they got the Union in there, Eduardo Gonzalez might shut the place down or close down.

I find that by indicating that drivers were placing their current remuneration scale in jeopardy by voting for union representation, and by threatening plant closure if the Union was voted in, Respondent, through Koenig's conduct, violated Section 8(a)(1) of the Act as alleged. While the General Counsel contends in brief (Br. 17) that Koenig unlawfully interrogated employee Ramos during the July 15 conversation, I refrain from finding the violation as the supervisor did not specifically ask the employee to reveal his union sentiments.

c. *By employee Carl Hoffman*

Employee Hoffman testified on direct examination that, in late June or in early July, Koenig told him that paid holidays and vacations, Thanksgiving turkeys, Christmas hams, the $400-a-week guarantee, and work uniforms would all be taken away if he voted the Union in. On cross-examination, Hoffman agreed Koenig indicated during the conversation that the benefits were not guaranteed and they would be negotiable in event the Union got in. He added, however, that Koenig indicated ''we would start at rock bottom.''

Several days after the above-described event, Hoffman indicated Koenig told him if the employees voted for the Union and it got in, their jobs would be in jeopardy.

[3] Respondent failed to call Koenig as a witness so comments attributed to him by employee witnesses are unrebutted.

The Board treated the subject of starting negotiations ''from scratch,'' ''ground zero,'' or from ''rock bottom'' in *S. E. Nichols, Inc*., 284 NLRB 556, 577 (1987), stating, inter alia:

> ''bargaining from ground zero'' or ''bargaining from scratch'' statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. On the other hand, such statements are not violative of the Act when other communications make it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negotiations. See also *Telex Communications, Inc*., 294 NLRB 1136 (1989).

Viewing Koenig's benefit bargaining related comments in the context described, I find Hoffman could have reasonably concluded Koenig was telling him that if they voted the Union in, they would receive only those wages and benefits the Union could induce their employer to restore. I find, as alleged, that by threatening to eliminate benefits and to bargain from scratch if the Union was voted in, Respondent, through Koenig's conduct, violated Section 8(a)(1) as alleged.

Patently, by threatening that employees' job would be in jeopardy if they voted for the Union, Respondent, through Koenig's conduct, violated Section 8(a)(1) of the Act.

d. *By employee Alonzo Henderson*

Employee Henderson testified that on July 6 or 7, 1992, Koenig told him, Carl Hoffman, and employee Mark Bristor they should not vote for the Union because it would be bad for everyone—Ed Gonzalez hated the Union so bad that he would close the doors before he would allow a union to be in there.

Henderson claimed that a few days after the above-described event, Koenig told him and employee Dargocey they should not vote for the Union because it was bad for everybody, that if the employees wanted to continue to work there, they should not vote for the Union.

Patently, by threatening that employees would lose their jobs if they voted for the Union, and by threatening plant closure if employees voted for union representation, Respondent, through Koenig's conduct, violated Section 8(a)(1) of the Act.

e. *By employee Jackie Rucker*

Employee Rucker testified that he had several conversations with Koenig concerning the Union. He recalled the first conversation occurred in Koenig's office around the first week of June 1992. During the conversation, Koenig told Rucker he needed to talk to the other employees about the Union because if they voted the Union in, it would affect them. When he asked how, Koenig said he would get laid off.

Around the end of June 1992, Koenig urged Rucker to talk to his coworkers about the Union. Koenig explained they were a small shop and he informed the employee that if the Union was voted in, they would just turn in the trucks and there was nothing the employees could do about it.

In a third conversation which occurred near the time of the above-described conversation, Koenig again urged Rucker to talk to his fellow employees and convince them they should vote no. He told the employee he knew he had three employees who would vote no, identifying them as Don McClain, Branko Devic, and John Brooks. Koenig then said he knew the three people who ''probably started this stuff and we're going to get rid of them the best way that we know how.'' Rucker asked who the three people were and Koenig told him they were Carl Dargocey, Rafael Ramos, and Mark Bristor.

I find that by seeking to cause employee Rucker to convince his coworkers that they should vote no in the election by telling the employee that if the Union got in, they would be laid off, and/or that Respondent would just turn the trucks in, Respondent, through Koenig's conduct, violated Section 8(a)(1) of the Act. Moreover, by threatening, in Rucker's presence, to terminate three named employees who Respondent suspected of ''starting this stuff,'' Respondent, through Koenig, coerced Rucker in the exercise of his Section 7 rights. Finally, by identifying employees who were for and against the Union, and who were responsible for the union activity, Respondent, through Koenig, sought to create the impression that Respondent had the union activities of employees under surveillance in violation of Section 8(a)(1) of the Act.

f. *By employee Tommie Smith*

Employee Smith testified that he had two union-related conversations with Koenig in mid-July 1992.

During the first conversation, which occurred as Smith and Koenig were walking across a field on Respondent's premises, Koenig told Smith (who is black) to ''talk to the black guys to convince them to vote no'' (the black guys were John Brooks and Jackie Rucker). Koenig indicated Smith should take that action because ''Ed didn't want a union and that he would just close the doors.''

The second conversation occurred in Koenig's office shortly before the election. On that occasion, Koenig stated he thought ''all this . . . union organization was come about by the baldheaded mother fucker [Dargocey].'' Koenig ended their conversation by stating, ''after this union shit is over with, there [are] going to be some tremendous changes which . . . should have been made a long time ago.''

By seeking to cause employee Smith to urge his fellow employees to vote no at the election by threatening plant closure if employees selected the Union as their representative, Respondent, through Koenig's conduct, violated Section 8(a)(1) of the Act. By identifying employee Dargocey as the employee who had instigated the union organizational drive, I find Koenig implied that Respondent had the union activities of employees under surveillance, and it thereby violated Section 8(a)(1) of the Act.

g. *By employee John Casto*

Employee Casto was hired by FMT on August 24, 1992. When he was interviewed by Koenig, he claims he was told the employees were trying to get a union in the trucking operation and a vote on it had passed. He testified Koenig told

him, ''But I'm still hiring people because I want to bust the Union.'' He claims Koenig went on to tell him that if a picket line went up, Casto would be expected to cross it because he had to serve a 90-day probationary period. After making the above statements, Koenig asked Casto if he still wanted the job and he said he did. Casto indicated that Koenig stated during the interview that if the Union got in, they would close the doors, and not to worry about it.

I find that by interrogating employee Casto about whether he would cross a picket line if one appeared, and by threatening indirectly to terminate him pursuant to a probationary policy, Respondent, through Koenig's conduct, violated Section 8(a)(1) of the Act. Noting that the election had already been conducted by the time Casto was interviewed, I conclude his testimony concerning closing the doors if the Union got in is incomplete and ambiguous, and I refrain from finding further threat of plant closure based on his testimony.

3. Conduct attributed to FMP Foreman Jim Nugent[4]

Employee Hoffman described a conversation that he had with admitted FMP Foreman Jim Nugent in August 1992. Hoffman indicated that prior to 1992, the FMT drivers had been invited to attend company picnics, but in August after the election, Nugent told him the truck drivers were ''union troublemakers'' and were not invited to the picnic because of their union activity.

I find that by telling an employee that FMT drivers were not invited to attend Respondent's 1992 picnic because they had engaged in union activity, Respondent, through Nugent's conduct, violated Section 8(a)(1) of the Act.

D. *The Alleged 8(a)(1) and (3) Violations*

1. The General Counsel's case

When the union organization campaign at Respondent's operation began, it employed 11 drivers. Their names and date of hire are as follows:

Donald McClain	7/5/89
John Brooks	5/30/89
Branko Devic	6/9/89
Tommie Smith	11/8/89
Louis Davis	11/8/89
Alonzo Henderson	1/31/90
Mark Bristor	3/28/90
Rafael Ramos	5/14/90
Karl Hoffman	8/28/90
Carl Dargocey	1/27/92
Jackie Rucker	4/13/92

[G.C. Exh. 17.]

Driver Mark Bristor testified that he and four other drivers contacted Teamsters Local 407 regarding representation in April 1992. As indicated, supra, the Union filed the petition in Case 8–RC–14732 on June 1, 1992, and an election was held among Respondent's drivers on July 17, 1992. Eight votes were cast for the Union, three were cast against it, and there were no challenged ballots. As indicated, supra, Respondent was aware of the identity of the three employees who voted against the Union as Koenig identified McClain, Brooks, and Devic as being antiunion in discussion with driver Rucker.

The Union was certified as the exclusive bargaining agent of FMT's drivers on July 28, 1992. On August 24, 1992, FMT hired three new drivers (John Casto, Larry Hill, and Eli Pounds). Employee Casto testified, without contradiction, that when Koenig hired him he told him he was still hiring people because he wanted to bust the Union. The supervisor further indicated Casto was to serve a 90-day probationary period and if the Union engaged in picketing, he would be expected to cross the picket line if he wanted to keep his job.

The first bargaining session was held on September 2, 1992. Jim Davis and driver Dargocey represented the Union and Ed Gonzalez, Attorney Alan Ross, and Attorney Marco Graves represented FMT. Davis, Dargocey, and Gonzalez described what occurred at the meeting. A composite of their testimony reveals that Gonzalez indicated during the meeting that the trucking operation was getting too big and he did not want the hassle of continuing to put time and money into it. Indicating that common carriers were already hauling all but about 30 percent of the product, and he indicated that, absent union proposals which would cause him to change his mind, he intended to go out of the trucking business on September 16, 1992. While the parties discussed ways the trucking operation could be improved, no agreement was reached on the terms of a collective-bargaining agreement.

A second bargaining session was held on September 10, 1992. Davis, Dargocey, and Local 407 President Sam Theodus represented the Union and Ross, Graves, Luis Gonzalez, and Hope Miles represented FMT. During the meeting, the Union proposed that the parties agree to a complete contract which was placed in the record as Respondent's Exhibit 7. No meaningful discussion of the contract occurred. Davis indicated the Union felt the timing of the closing of the operation was highly suspect and to gain a better understanding of what Respondent was doing, the Union presented the management negotiators with a list of questions placed in the record as Respondent's Exhibit 6. As the session ended, the Union was asked to submit any proposals it had to make regarding the closure issue by September 16, 1992.

On September 16, 1992, Respondent's attorney Alan Ross sent Union Business Representative Davis a letter placed in the record as the General Counsel's Exhibit 1(k), the body of which is as follows:

> As requested at our last meeting, I attempted to reach you via telephone several times at the Ramada Inn at O'Hare Airport in Chicago. I left messages with a woman who was taking messages for whatever Teamster function you were attending. She said she did not know which of the several meetings in progress you were attending. I asked her to specifically advise you of the closure of the Ferrous Metal Transfer Co., effective September 16, 1992. In the hope that this correspondence will reach you as soon as possible, I am having it sent via telefacsimile to your office.
>
> The purpose of this letter is to advise Local 407 that on September 16, 1992, Ferrous Metal Transfer Co. (''the Company'') made the irrevocable decision to cease direct involvement in the steel hauling business.

[4] Respondent failed to call Nugent as a witness and conduct attributed to him is unrebutted.

> As we told you, that decision was brought about by two factors. The first factor is that steel hauling is not part of the company's primary enterprise—the processing of steel. The second factor is that now that the concept of single billing for pickup, process and delivery has proven successful, companies with much more expertise in the trucking industry are willing to perform those services.
>
> Mr. Gonzalez and the Company are no longer willing to devote the managerial attention and capital investment necessary to operate the trucking operation. He also no longer wishes the potential liabilities that go along with involvement in the steel hauling business and mass of regulatory requirements imposed by trucking law. Nothing contained in your proposals addressed these concerns. The Company has decided to direct its managerial energy to the area of business it knows best—the steel processing business.
>
> As we told you on September 10, 1992, we are very interested in providing for a smooth transition for our employees. We have asked you to engage in bargaining over the effects of our decision to go out of the trucking business. You have not availed yourself of that opportunity. In view of the company's concern for its employees, the Company has asked the carrier which is assuming the portion of work formerly performed by Ferrous Metal Transfer to offer employment to as many of the former employees as possible. We continue to invite you to negotiate concerning the effects of the closing of this business.
>
> Thanking you in advance for you attention to these matters, I remain,

On September 18, 1992, Respondent laid off employees Mark Bristor, John Casto, Carl Dargocey, Larry Hill, Karl Hoffman, Eli Pounds, Rafael Ramos, and Jackie Rucker. Subsequently, by letters dated September 23, 1992, Respondent advised each of the above-named drivers to apply for employment with a company named Steel Transport which ''will be picking up most, if not all, of the work you have been performing.'' (G.C. Exhs. 1(k), (d).)

Drivers Rucker and Casto indicated during their testimony that at the time of their layoff, Koenig informed them that he had recommended them to Steel Transport and they were to go to work there Monday. Rucker testified that Koenig told him he was making the same arrangement for drivers Tom Smith, Karl Hoffman, and Casto. The record reveals that FMT sent the leased Ryder trucks driven by the employees laid off on September 18 to Steel Transport. Casto testified he drove one of the trucks so transferred and hauled the same loads he had hauled while employed by FMT. Rucker testified he drove the same truck at Steel Transport that he had driven at FMT, and he hauled to and from the same locations he had hauled to and from while employed at FMT. The drivers testified they were paid 24 percent of the load by Steel Transport, while they had been paid 22 percent of the load by FMT.

By letter dated October 19, 1992, Attorney Ross informed the Union, inter alia:

> I have been advised by my client that the transfer of all of Ferrous Metal Transfer's (FMT) business is taking longer than anticipated. While it is still the intention of FMT to have a common carrier or carriers assume all of the business, due to the indeterminate length of time that this phaseout may take, if you wish to meet and confer further, please contact me so that a mutually convenient time and place for a meeting may be arranged. There are currently five employees remaining on the payroll of FMT. As this number decreases, we will periodically advise you if you so request.

Union Representative Davis testified the Union did not respond to the described Ross letter because it was of the view that FMT was going out of business for discriminatory reasons.

From September 18 to November 13, 1992, Respondent continued to operate Ryder-leased trucks driven by employees McClain, Brooks, Devic, Louis Davis, Alonzo Henderson, and Tommie Smith. Davis, Henderson, and Smith were laid off on November 13. At the time he was laid off, Koenig told Smith he had recommended him to Jim Bostic at Steel Transport and Bostic would hire him. Smith indicated he started to work on Monday, November 16, 1992, at Steel Transport driving the same truck and making the same runs he had made at FMT.

Employee Rucker testified that he and others drove for Steel Transport until March 1993. He recalled that one Friday the signs on the trucks were changed from Steel Transport to Ohio Transport. In June 1993, he indicated the Ohio Transport signs were replaced with MHM signs and MHM took over the offices at the Ferragon, FMP premises previously occupied by Koenig and FMT.

The record reveals that drivers McClain and Devic continued to drive for FMT until it eventually ceased operation in May 1993. The record fails to reveal when Brooks was laid off.

Although FMT eventually ceased operations, the corporation remains active because it remains bound by the truck leases it entered with Ryder, and, as Ed Gonzalez explained, the litigation expense in the instant case is charged to FMT. To enable FMT to make the lease payments due Ryder, moneys collected by FMP pursuant to its PPD concept are transferred to FMT.

2. Respondent's defense

Respondent presented its defense through testimony given by Ed Gonzalez and Anthony Potelicki, and by placing certain documentary evidence in the record.

Gonzalez sought during his testimony to distance himself from the union situation by claiming he did not meet with the drivers until he met with them after July 1, 1992, and read prepared speeches to them. Although Respondent elected to not place Koenig on the witness stand, it, through Gonzalez, placed in evidence a document entitled ''Union Organization Advice to Management'' (R. Exh. 13) which contains a number of ''do's'' and ''don'ts'' management figures are to observe during a union organizational campaign. Gonzalez testified he instructed Koenig to conduct himself in accordance with the described document and he was of the opinion that Koenig had followed his directions and said nothing unlawful to the drivers during the campaign.

When he was asked if he provided the Union with any reasons for wanting to get out of the trucking business, Gonzalez stated (Tr. 198–199):

> A. Basically, they've been advised of four reasons. One, we have limited management time. I told them that we—because of the limited management time of our entire staff, we have to concentrate all our resources on the main animal, which is Ferragon. If we didn't—it's like the example I said yesterday. If you got a garage burning and a house burning, you're going to sacrifice the garage to save the house. That's what we did. We notified them of that, that that was one of the reasons.
>
> Number two, we had the safety concerns. They admit it, it's in their files. Some of the drivers dumped some loads, and we had by the skin of our teeth barely survived any tremendous casualties out there on the street, so we had the safety concerns which they didn't know. They were blaming us for buying the wrong chains, if that's a reason. Regardless, that was a fact that we had to consider, and we didn't want to deal with that.
>
> Fourthly, there were financial losses—thirdly, there were financial losses that we had to deal with both for Ferragon and Ferrous Metal Transfer and Republic and everything else we were doing. If you have limited time and limited money and you have to preserve, all we were going to preserve was the limited financial resources we had and concentrate them on Ferragon.
>
> . . . .
>
> A. There was a fourth one. I'm going to think about it in just a second. I can't think of it right now. There was four reasons. There's always been four reasons.
>
> Q. What—
>
> A. Oh, management time—from an executive standpoint, we didn't have the financial resources to deal with it, we had the safety concerns, and we didn't have operating management that knew what they were doing.

Gonzalez testified that when FMT was created, he elected to incorporate it separately because of liability concerns and due to the fact that it was an entirely different type of business than steel processing. He indicted he entered lease agreements with Ryder so he could get in the trucking business fast and perhaps get out fast also.

According to both Gonzalez and Potelicki, Respondent's business operations, including Republic Metals, FMP, and FMT, suffered severe losses in calendar year 1991. In support of that assertion, Respondent placed in evidence as Respondent's Exhibit 8, ''Ferragon Corporation's Balance Sheet and Statement of Operations'' covering the years 1989 through 1992. The statement of operations document reveals that in 1991, Republic Metals lost $393,642 and Ferragon/FMP lost $1,099,486. Gonzalez indicated the loss sustained by Republic caused him to close that division of Ferragon. While Gonzalez claimed he talked about the possibility of closing the trucking operation as early as January 1992, he admitted he had not discussed that possibility with Koenig.

Gonzalez and Potelicki indicated that by early 1992, Ferragon's 1991 losses and lack of support by its banking institution placed Ferragon in a position wherein it was unable to pay its creditors in timely fashion. Through Potelicki, Respondent placed in evidence several documents reflecting its situation. Thus Respondent's Exhibit 9, a letter from Ryder dated June 8, 1992, reveals that invoices for the period March 1 through June 1, 1992, in the amount of $133,531.81 were unpaid. Respondent's Exhibit 10 reveals that various collection agencies, attorneys, etc., were seeking payment of $593,067.35; and Respondent's Exhibits 11(a) and (b) reveal amounts sought in some 40 lawsuits filed against Ferragon as well as the disposition of such lawsuits.

In early 1992, Respondent hired a firm called the Packland Group in an effort to solve its financial problems. Through the efforts of that group, Ferragon successfully caused a number of its major creditors to agree to accept full payment of amounts Ferragon owed them in payments which were to be spread out over 5 years and/or 60 months. Potelicki indicated Ferragon achieved such agreements in late 1992.

Although Respondent admittedly did not tell the Union it had decided to close FMT for economic reasons, it claims in its brief that Ferragon's economic condition in 1992 was the major reason for the decision to close the trucking operation. In support of that contention, it points to General Counsel's Exhibit 24, the ''Balance Sheet/Statement of Operations for FMT'' for the years 1989 through 1992. The statement of operations portion of that document shows, inter alia, that while FMT had operating profits in the range of $37,000 to $199,000 during the years covered, they ended up with losses ranging from $40,000 to $200,475 during years 1989–1991, and net income of $20,651 in 1992 after ''Facility Fee Expense'' ranging from $40,000 in 1989 to $210,000 in 1992 had been paid to Ferragon. Significantly, while Gonzalez claimed he took no salary from FMT during the years in question, Potelicki indicated the ''Facility Fee Expense'' covered such things as salaries and benefits of executive personnel (of Ferragon), office supplies, rent, security, and partial salaries of three employees in FMP's accounting department. With respect to the ''Cost of Sales'' portion of the statement of operations, Potelicki testified it documented wages paid by FMT to drivers and Koenig, payroll taxes related to wages, benefits such as insurance, lease cost of trucks, fuel, repairs and maintenance, and chains and other items purchased.

With respect to the bargaining sessions, Gonzalez admitted he told the union negotiators at the September 2 session that he was not necessarily interested in proposals for a collective-bargaining agreement. He indicated that instead, he wanted proposals that might cause him to change his mind about closing FMT. Without indicating he told the Union what he specifically desired, he testified that to change his mind about closing FMT, the Union would have had to offer something like a million dollar loan from their pension fund.

Analysis and conclusions

With respect to the alleged 8(a)(3) violations, the evidentiary burden of the parties is set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), where the Board stated (at 1089):

> First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a ''motivating factor''

> in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

I have found, supra, that the instant Respondent sought to cause its drivers to refrain from obtaining union representation by engaging in numerous violations of Section 8(a)(1) of the Act. Such conduct compels a conclusion that Respondent possessed marked antiunion animus. As found, during the union organization campaign, the drivers were repeatedly threatened with plant closure if they selected the Union as their bargaining representative, and their manager, Koenig, pointedly predicted that union instigators, Dargocey, Ramos, and Bristor would be fired if the Union was voted in. Within a short time after the Union won the election and was certified as s the exclusive representative of Respondent's drivers, Dargocey, Ramos, Bristor, and five other drivers (Casto, Hill, Hoffman, Pounds, and Rucker) were terminated and their work was subcontracted out. A short time later, three additional drivers were terminated under similar circumstances (Davis, Henderson, and Smith). Finally, the record reveals that three drivers known by Respondent to have cast no votes during the election (McClain, Brooks, and Devic) were retained in the employ of Respondent long after it had informed the Union it was going out of business. In my view, the foregoing sufficiently supports an inference that the protected conduct of its employees was a ''motivating factor'' in Respondent's decision to contract out the work performed by employees Dargocey, Ramos, Bristor, Casto, Hill, Hoffman, Pounds, and Rucker on September 18, 1992, and that performed by employees Henderson, Smith, and Davis on November 13, 1992.

Respondent sought to show that it subleased the Ryder trucks to Steel Transport, thereby necessitating the termination of the drivers released on September 18 and November 13, 1992, for valid business reasons. As indicated, supra, the assigned reasons were: Lack of management time for FMT, safety concerns, and the existing of a financial crisis which threatened the continued existence of FMP. I find the evidence offered by Respondent in support of its reasons for subleasing the Ryder trucks and causing Steel Transport to accomplish its PPD work to be unconvincing.

With respect to alleged safety concerns, the only concern described by Ed Gonzalez was a concern that coils might fall off of trailers and expose Respondent to liability. Union Representative Davis testified that the coil situation was discussed at the September 2, 1992 bargaining session and he suggested that Respondent purchase chains with the necessary strength if it wished to assure that coils not fall off of trailers. Further, Ed Gonzalez indicated during his testimony that Respondent purchased insurance on the trucks performing the PPD service through an arrangement with Ryder. The record fails to convince me that Respondent had the safety concerns it professed to have.

Turning to ''management time,'' Gonzalez explained that he was not talking about the day-to-day management decisions made at FMT as Koenig made those decisions. Instead, he indicated his FMT management time was spent as follows (Tr. 239):

> Well, it's mainly conceptual and commercial thinking and where it's going to a head and how to organize its financials and whether I want to expand it or contract it, those kinds of considerations. It isn't like I go there and say, ''Those loads go there, and those drivers go there.''

While General Counsel's Exhibit 24 reveals that Ferragon/FMP did, in fact, receive extremely large sums of money from FMT for, inter alia, the management time of Gonzalez, Miles, and Potelicki, the record fails completely to describe with any degree of specificity the nature of the FMT related management services provided by Gonzalez and Miles. I am not persuaded by the instant record that Gonzalez devoted extensive time to management matters involving FMT during the spring, summer, and fall of 1992.

Respondent indicates in its brief that the financial condition of Gonzalez' operations during late 1992 was the principal reason for the decision to cause an unrelated company to assume responsibility for the Ryder leases and the transportation functions necessitated by the PPD service that Respondent had successfully initiated. The record does, in fact, reveal that the FMP division of Ferragon, which employs approximately 100 employees, was in financial difficulty by mid-1992 and was unable to pay its suppliers in timely fashion. The record also reveals that the Spectrolux operation was part of the problem as machinery valued at some $1.5 million had been delivered to it but the bank had reneged on a promise to finance the acquisition and Ferragon did not have the operating capital to pay for the machinery. Similarly, the record reveals that the Republic Metals division had incurred losses slightly in excess of $393,000 before a decision to close that operation was made. Indeed, it appears Respondent was certainly in need of the services of the Packland Group in 1992 if it was to avoid a bankruptcy situation.

During his testimony, Potelicki explained that portion of General Counsel's Exhibit 24 entitled ''Ferrous Metal Transfer Co. Statement of Operations.'' While the exhibit reveals that FMT had significant gross profits in each year ($37,043 in 1989; $199,060 in 1990; $48,983 in 1991; and $195,651 in 1992), it indicates that ''Facility Fee Expense'' paid to Ferragon in each of those years ($40,000 in 1989; $200,475 in 1990; $180,000 in 1991; and $210,000 in 1992) caused FMT to experience losses in all years but 1992. As revealed, supra, when he was asked to indicate what Ferragon provided to FMT to earn the facility fees it levied on the trucking company, Potelicki replied the services included salaries and benefits of executive personnel of Ferragon, office supplies, rent, security, and partial salary expense of the three employees in FMP's accounting office. Significantly, no breakdown of the fee allotted to each was provided.

In the circumstances described, it would appear that Ferragon was extracting significant sums of money from the FMT operation each year in the form of ''facility fees.'' While it would appear that Ferragon/FMP could no longer charge FMT a significant facility fee once the Ryder trucks were subleased to Steel Transport, General Counsel Exhibit 24 reveals that during the period September 18 to December 31, 1992, Steel Transport, after paying its drivers 24 percent of the load rather than 22 percent of the load FMT had paid them, remitted ''Agency Freight Commission Income'' in the

amount of $35,000 to Ferragon/FMP. Viewing the facts outlined, it appears to me that the entity which accomplished the transportation of steel pursuant to Respondent's PPD concept earned significant profits. I find Respondent's claim that it decided to close FMT because it operated at a loss in all years but 1992 to be unconvincing due to the fact that Ferragon/FMP was receiving substantial ''facility fees'' from FMT during the years indicated.

Briefly recapitulated, the record reveals that eight employees voted for union representation during the July 17, 1992 election. Facts set forth, supra, warrant an inference that Respondent knew the identity of the eight as well as the three employees who voted against the Union. During the entire organization campaign, Respondent's manager Koenig told the drivers their jobs would be abolished if they voted for the Union. Koenig expressly indicated that the instigators, Dargocey, Ramos, and Bristor were going to be fired because they spearheaded the organization drive. Shortly after the Union was certified as the exclusive representative of Respondent's drivers, the Ryder trucks driven by those employees who had voted for the Union were subleased to Steel Transport and all of the drivers except McClain, Brooks, and Devic, the three drivers Koenig had identified as ''no'' votes, were terminated. Having carefully considered the reasons given by Respondent for its decision to sublease only those trucks driven by prounion employees, I find those stated reasons for its action to be mere pretexts advanced to cover the real reason for its actions—the fact that the drivers obtained union representation. Similarly, I do not credit Gonzalez' unsubstantiated claim that he originally considered closing FMT as early as January 1992. The record facts discussed above convince me the decision to alter the FMT operation was made when Respondent lost the election.

In sum, I find that the record warrants a conclusion that Respondent subleased the trucks driven by all its drivers except McClain, Brooks, and Devic in retaliation for its drivers' selection of the Union as their bargaining agent. I find that Respondent has failed to demonstrate that it would have subleased those trucks in the absence of its drivers' participation in union activities.[4] Accordingly, I find, as alleged, that by discharging drivers Dargocey, Ramos, Bristor, Smith, Davis, Henderson, Hoffman, and Rucker, Respondent violated Section 8(a)(1) and (3) of the Act.

E. *The Alleged 8(a)(5) Violation*

As indicted supra, Respondent and the Union held negotiation sessions on September 2 and 10, 1992. While certain terms and conditions of employment were briefly discussed and the Union presented Respondent with a proposed contract, Respondent indicated it was interested only in proposals which might cause Ed Gonzalez to change his mind about closing the FMT operation. Respondent did not suggest what types of proposals might cause Gonzalez to change his mind, and the Union failed to make any proposals which were felt by Respondent to be significant.

Respondent contends the Supreme Court's decision in *First National Maintenance v. NLRB*, 452 U.S. 666 (1981), is controlling and it cannot be found to have refused to bargain with the Union in violation of Section 8(a)(5) of the Act. Specifically, it contends the facts warrant a conclusion that its decision to sublease the Ryder trucks was made for economic reasons other than the cost of labor and the decision resulted in a fundamental change in the nature and scope of Respondent's business. The General Counsel contends *First National Maintenance* is not applicable because Respondent's actions constituted ''Fibreboard subcontracting'' and the decision to close was unlawfully motivated.

In agreement with the General Counsel, I find that where, as here, a decision to subcontract is motivated by antiunion reasons, the employer is not exempt from a bargaining obligation under *First National Maintenance*. As observed in *Continental Winding Co.*, 305 NLRB 122, 125 (1991), discrimination on the basis of union animus cannot serve as a lawful entrepreneurial decision.

Pointing to the events which occurred during the September 2 and 10 bargaining sessions which are described supra, Respondent contends it satisfied its bargaining obligation if it had one. I disagree as the record clearly suggests that Respondent had decided before it ever met with the Union that it was going to sublease the trucks driven by those drivers who voted for union representation. In my view, Respondent was merely going through the motions at the bargaining sessions and the Union was all but faced with a ''fait accompli'' at the outset of negotiations.

In sum, I find that by deciding to sublease trucks which it used to accomplish pickup and delivery service for FMP to Steel Transport for unlawful reasons, Respondent precluded the Union from engaging in meaningful bargaining concerning the decision to sublease the trucks and it thereby violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Ferragon Corporation, Ferrous Metal Processing, Inc., and Ferrous Metal Transfer, Inc. constitute a single-integrated business and a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive collective-bargaining agent of the employees in the appropriate unit set forth below for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

> All truck drivers at the Employer's 11103 Memphis Avenue, Brooklyn, Ohio facility but excluding all office clerical employees and all professional employees, guards and supervisors as defined in the Act.

4. By unlawfully interrogating employees regarding their participation in union activities, soliciting employees' grievances, and promising to remedy them during a union organization campaign, threatening to take away employee benefits and start bargaining at ''rock bottom'' if they vote for the Union, threatening that drivers will lose their jobs if they vote for a union, threatening plant closure if employees ob-

[4] Respondent suggests that under *Textile Workers Union v. Darlington Mfg., Co.*, 380 U.S. 263 (1965), plant closure is permissible absent a showing that the purpose and effect of the closure was to chill unionism at any of the employer's remaining plants. The Supreme Court, however, excepted from the reach of its decision, situations analogous to the instant case ''where a department is closed for antiunion reasons, but the work is continued by independent contractors.'' Id. at 272–273 fn. 16.

tain union representation, threatening that employees' job would be in jeopardy if they vote for the Union, telling employees Respondent intended to get rid of named employees because they started the union stuff, telling employees they would be laid off and their trucks would be turned in if they voted for the Union, seeking to create the impression that the union activities of its employees are under surveillance, by interrogating an employee regarding whether he would cross a picket line and by threatening him with discharge if he did not cross it, and by telling an employee that drivers were not invited to attend a company picnic because they were union troublemakers, Respondent violated Section 8(a)(1) of the Act.

5. By contracting out the work previously performed by employees Tommie Smith, Louis Davis, Alonzo Henderson, Mark Bristor, Rafael Ramos, Karl Hoffman, Carl Dargocey, and Jackie Rucker, and by discharging the named employees, with an object of retaliating against employees because they selected the Union as their bargaining agent, Respondent violated Section 8(a)(1) and (3) of the Act.

6. By deciding unilaterally to sublease trucks which it used to accomplish pickup and delivery service for FMP to Steel Transport for unlawful reasons, Respondent precluded the Union from engaging in meaningful bargaining concerning the decision to sublease the trucks and it thereby violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent unlawfully subleased its trucks as part of a plan to punish certain of its employees for selecting the Union as their bargaining agent, and, in the absence of evidence which would demonstrate that a requirement that restoration of the status quo ante would be unduly burdensome on it, I shall recommend that Respondent be required to reopen and reestablish its FMT operation in order to restore the status quo ante existing prior to its commission of unfair labor practices.[5] After having done so, it will be required to offer Tommie Smith, Louis Davis, Alonzo Henderson, Mark Bristor, Rafael Ramos, Karl Hoffman, Carl Dargocey, and Jackie Rucker immediate and full reinstatement to their former positions of employment, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of their termination to the date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]

[5] See *Lear Sigler, Inc*., 295 NLRB 857 (1989).